UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: June 10, 1993

FAA Order No. 93-19

In the Matter of:	Docket No. CP91NM0319
PACIFIC SKY SUPPLY, INC.	

DECISION AND ORDER

Complainant appeals from an order issued by Administrative Law Judge Robert L. Barton, Jr., granting Respondent's motion for decision, entering judgment for Respondent, and cancelling the hearing.[1/] Because the law judge improperly construed Section 21.303(a) of the Federal Aviation Regulations (FAR),[2/] which Respondent allegedly violated, the law judge's order is reversed and this case is remanded to him for further proceedings consistent with this opinion.

The complaint alleged that Respondent violated Section 21.303(a) by producing replacement or modification parts for sale for installation on type-certificated products

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1/ A copy of the law judge's order is attached.

2/ 14 C.F.R. § 21.303(a) (1986) provides, in relevant part: "... [N]o person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval issued under this subpart."

without first obtaining Parts Manufacturer Approvals for the parts.[3/] Complainant proposed a civil penalty of $19,000. Respondent moved to dismiss[4/] the complaint, claiming that it did not intend to produce the parts for sale for installation on type-certificated products. Complainant admitted that it did not have evidence that any of the parts Respondent produced had been installed on a type-certificated product. However, Complainant said, it was prepared to show that Respondent produced the parts intending to market them for uses that included installation on type-certificated products. Complainant argued that the regulation is violated whenever it is reasonably likely that the parts would be installed on type-certificated products.

The law judge disagreed, ruling instead that in order to prevail, Complainant must be able to show by a preponderance of the evidence that Respondent either:

> (1) produced the parts with the specific intent of having them installed on type-certificated products; or
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> (2) had actual knowledge that the parts would be installed on a type-certificated product.

3/ Complainant alleged that Respondent produced: (1) 62 seats, of which at least 18 were sold for installation on type-certificated products; and (2) 100 rings, of which at least one was sold for installation on a type-certificated product.

4/ Although Respondent's motion was entitled "Motion to Dismiss" (motions to dismiss are provided for in Section 13.218(f)(2) of the Rules of Practice), the law judge properly construed it as a motion for decision under Section 13.218(f)(5), because it relied on matters outside the complaint. See the law judge's Order Denying Respondent's Motion to Dismiss, p. 3 (September 18, 1992).

Order Denying Respondent's Motion to Dismiss, p. 8 (September 18, 1992).

After the law judge issued his ruling, counsel for Complainant stipulated that, given the law judge's interpretation of the regulation, Complainant could not establish a prima facie case of a violation. The law judge then entered judgment for Respondent. Order Granting Respondent's Motion, Entering Judgment for Respondent, and Cancelling Hearing (November 6, 1992).

In addition to its appeal, Complainant has moved for oral argument, claiming that: (1) the issue in this case, one of regulatory interpretation, has never arisen before; (2) the underlying regulatory context is complex; and (3) the resolution of this case will significantly affect the FAA's ability to influence the proliferation of unapproved aircraft parts.

Respondent opposes Complainant's motion, arguing that it is doubtful that Complainant's attorney can add anything to the limited issue addressed in Complainant's appeal. Respondent asserts that the law judge's written decision was extensive and supported, that both parties have filed briefs explaining their positions, and that oral argument would require Respondent's counsel to travel to Washington, D.C., from California. Finally, Respondent argues, Complainant could have filed a petition to file an additional brief, as permitted by 14 C.F.R. § 13.233(f), but failed to do so.

The Rules of Practice provide as follows:

> The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

14 C.F.R. § 13.233(f). (Emphasis added.)

As the regulation indicates, the pertinent question in determining whether to permit oral argument is whether oral argument will contribute substantially to the development of the issues on appeal. Id. This case involves an issue of regulatory interpretation. Complainant has failed to persuade the Administrator that oral argument is necessary to resolve that issue. Therefore, Complainant's motion for oral argument is denied.

Turning now to the merits of this case, the law judge erred by interpreting Section 21.303(a) to require evidence of either specific intent or actual knowledge on the part of the producer. The regulation contains no reference to either "specific intent" or "actual knowledge." Nothing in its language mandates the law judge's standard. Indeed, the term "specific intent," meaning "the intent to accomplish the precise act which the law prohibits," is a criminal law concept. See the definition of "specific intent" appearing under the definition of "Intent" in Black's Law Dictionary, p. 727 (1979). Imposing a more rigorous criminal law standard like specific intent in a civil penalty context may be

inappropriate, particularly in the absence of express language requiring specific intent in the regulation or the regulatory history.[5/]

Under the law judge's construction of the regulation, a producer's thoughtless disregard of the consequences that are substantially certain to flow from his or her acts is not prohibited by the regulation. The law judge interpreted the regulation far too narrowly. In doing so, he created a loophole for producers who sell to "middlemen." Manufacturers of unsafe products may not avoid liability by claiming that the consumer lacked privity of contract with them.[6/] Similarly, producers of aircraft parts should not be permitted to avoid responsibility for producing unapproved parts when they know or should know that the parts are substantially certain to be installed on type-certificated products.

Complainant's interpretation of the intent requirement of Section 21.303(a) is that Complainant must prove that a reasonable person would find it reasonably likely that the parts would be installed on type-certificated products. Complainant's formulation is also rejected.

5/ See In the Matter of Schultz, FAA Order No. 89-5 (November 13, 1989), in which the Administrator rejected Respondent's claim that Complainant must show specific intent to support a violation of Section 901(d), 49 U.S.C. § 1471(d) (prohibiting having a deadly or dangerous weapon on or about one's person or accessible property while aboard or attempting to board an aircraft). Respondent's argument that specific intent must be shown was rejected by the Administrator in part because Section 901(d) is not a criminal statute.

6/ Prosser and Keeton, The Law of Torts § 96 (1984).

The most reasonable interpretation of the regulation is that Complainant must show that Respondent knew or should have known that it was substantially certain that the parts produced by Respondent without a Parts Manufacturer Approval would be installed on type-certificated products.[7/] This is a somewhat more difficult burden to meet than Complainant's reasonably likely standard. It more appropriately balances the equities involved--the FAA's duty to promote aviation safety[8/] by controlling the spread of unapproved parts, and the producer's right to produce parts without FAA approval when it is insufficiently probable that the parts will find their way into type-certificated aircraft.

Respondent has argued that Complainant's interpretation of Section 21.303(a) in this case--the "reasonably likely" standard--is a departure from a previous interpretation issued by the FAA. In an interpretation issued on February 28, 1980, the Acting Assistant Chief Counsel for Regulations for the FAA stated, in relevant part, as follows:

> The key phrase in [Section 21.303(a)] is "for sale for installation on a type-certificated product." A person who produces a modification or

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7/ This standard is drawn from tort law. The situation in this case is more analogous to civil tort law than to criminal law. Under the law of torts, intent is not necessarily a desire to do harm. As noted in Prosser and Keeton's The Law of Torts § 8 (1984): "Intent ... is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." (Emphasis added.)

8/ Section 601(a) of the Federal Aviation Act, 49 U.S.C. App. § 1421.

> replacement part that is intended to be installed on a type-certificated product must hold an FAA-PMA approval. If the part is not produced with that intent, but subsequently is installed in a type-certificated product, the producer is not subject to FAR 21.303(a).
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> We realize that in many circumstances the intent of the producer regarding the use of a particular part may be unclear. A determination of the producer's intent is a legal issue that may have no bearing upon the initial enforcement process. If the inspector has reason to believe that a violation of FAR 21.303(a) has occurred, an EIR should be prepared and processed for legal enforcement action.

The 1980 interpretation indicates that: (1) Section 21.303(a) contains an intent requirement; and (2) it is intent at the time of production that matters. The interpretation does not, however, discuss the meaning of the intent requirement. Instead, the interpretation left that issue for another day. Today is that day. Though the reasonably likely standard urged by Complainant is not inconsistent with the 1980 interpretation, it does not afford sufficient protection to producers of parts that have legitimate markets other than type-certificated products. As noted above, substantial certainty is a more balanced standard, and it too is consistent with the 1980 interpretation.

FOR THE FOREGOING REASONS, this case is remanded to the law judge for proceedings consistent with this opinion.

JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 9 day of June, 1993.